STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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on its own motion,	)	**Docket No. 00-0596**
	)	
Revision of 83 Ill. Adm. Code 730.	)	

REPLY BRIEF ON EXCEPTIONS

OF THE PEOPLE OF THE STATE OF ILLINOIS

AND THE CITIZENS UTILITY BOARD

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The People of the State of Illinois, by James E. Ryan, Attorney General and the Citizens Utility Board (AG/CUB) submit the following Reply Brief on Exceptions to the Proposed Order issued on June 27, 2002.

I. The Proposed Order Correctly Found As A Matter Of Law That The Civil Penalties Limitations In Section 13-305 Do Not Apply To Service Quality Penalties And That Section 13-712 Of The Public Utilities Act Is Primary Authority For This Rule.

In our Exceptions and Brief on Exceptions, AG/CUB stated that the Application portion of the rule should refer to section 13-712 of the PUA, 220 ILCS 5/13-712. Staff agreed that section 13-712 should be cited, and proposed language with which AG/CUB agree[1]. Staff Brief on Exceptions (BOE) at 10 (section R.). Staff also proposed that Part 730 contain a cross-reference to section 13-506.1 of the Act, which authorizes alternative regulation. Id. at 2-4. Again, AG/CUB agree with Staff's proposed language on page 4 of its Exceptions.

In connection with their objection to the penalty provision in the proposed order, Illinois

[1] The proposed language for this exception was mistakenly omitted from the AG/CUB Brief on Exceptions, and AG/CUB apologize for any inconvenience this oversight may have caused.

Bell Telephone's ("IBT") and Verizon argue that Part 730 and this proceeding are not governed by section 13-712. IBT BOE at 21-22; Verizon BOE at 6. They argue that because Part 730 rules existed and this docket was initiated before section 13-712 was enacted, section 13-712 is somehow irrelevant. This argument would require the Commission to ignore both the work done by the General Assembly to specifically address the public's service quality concerns one year ago, and the fact that this docket was stayed pending the amendment of Illinois' telecommunications law last year so that its effect could be incorporated. See Notice of Hearing Examiner's Ruling, May 21, 2001 and underlying motions. Their argument should be rejected as an erroneous effort to block implementation of the legislative will.

The Public Utilities Act "is subject to repeal or amendment of the Legislature at any time that the Legislature see fit in the public interest to so do." Village of Monsanto v. Touchette, 63 Ill.App.2d 390, 400-401 (1965). One of its primary and historical purposes has been "the assurance of adequate service" to the public. Further, it is clear that the law or statute that exists at the time that an order is entered is the controlling authority, particularly when the change in the law was remedial, or in response to an existing situation that the General Assembly sought to "remedy" or change. In re Proner, 118 Ill.2d 512, 519 (1987)("amendments relating to the remedy or a matter of procedure are generally applied retroactively."). "The legislature has the authority to change the law for future cases arising from facts existing prior to the effective date of the legislation which made the change." Daley v. Zebra Zone Lounge, Inc., 236 Ill.App.3d 511, 515 (1992). The key question is whether the legislature intended the law to operate retroactively, and whether "justice, fairness and equity require retroactive application." Id.

The legislative history of House Bill 2900, which amended Illinois' telecommunications

law in 2001, demonstrates that the legislature intended the Commission to conform its service quality rules to the new amendments. Section 13-712 was enacted shortly after residents throughout the state experienced severe service quality degradation, and the General Assembly was determined to address the situation and assure adequate service quality going forward. E.g., Transcript of Senate Debate on House Bill 2900 on May 30, 2001 at 34-35. If the Commission were to ignore that legislative intent in subsequently enacting service quality rules, it would be ignoring the legislative will, and acting contrary to the Public Utilities Act as it exists today. Accordingly, section 13-712 provides the authority for the Part 730 rules.

Illinois Bell argues that section 13-712 only authorizes the Part 732 rules. IBT BOE at 22. Although it is true that the credit provisions of Part 732 are taken directly from section 13-712, section 13-712 has a broader application, addressing service quality in general, reporting and penalties. As the Court in Daley v. Zebra Zone stated: "A subsequent amendment to a statute may reveal the legislature's intent in enacting a statute, especially where the amendment was enacted soon after controversy developed over the original version. Retroactive application is especially appropriate where the amendment does not change the law but merely served to clarify a statute. Consequently, in the absence of contrary legislative intent or manifest injustice, courts will apply the law in effect at the time of their decisions." 236 Ill.App.3d at 515. In this case, the question of whether utilities could be required to pay fines or issue customer credits in the event of service quality lapses was discussed in this very docket prior to the enactment of section 13-712. There was disagreement on the issue, (see Staff Ex. 2.0 at 20, filed May 21, 2001) and the General Assembly resolved the question. The law requires that section 13-712 be applied to the rules adopted in this docket.

IBT further argues that the penalty provisions of section 13-305 apply despite the clear statement in that section that it applies "in a case in which a civil penalty is not otherwise provided for in the Act." 220 ILCS 5/13-305. IBT BOE at 22. IBT then quotes the subsection of Section 13-712, which provides specifically for "fines, penalties, customer credits, and other enforcement mechanisms." Id.; 220 ILCS 5/13-712(c). On its face, section 13-305 does not apply to service quality issues because section 13-712 provides for fines and penalties.

IBT then maintains that the standards contained in section 13-712(c) are legally inadequate. The Commission should be aware that the cases IBT cites are not controlling. Southern Illinois Asphalt Co., Inc. v. Environmental Protection Agency, 15 Ill.App.3d 66 (1973), was expressly rejected by the Illinois Supreme Court in City of Waukegan v. Pollution Control Bd., 57 Ill.2d 170, 184, 311 N.E.2d 146 (1974), where the court resolved a split in the District Courts of Appeal and held:

> The [Pollution Control] Board is to conduct hearings and, if violations are found, appropriately it is to impose penalties. The legislature may confer those powers upon an administrative agency that are reasonably necessary to accomplish the legislative purpose of the agency (Department of Public Works and Buildings v. Lanter, 413 Ill. 581, 587, 110 N.E.2d 179; Reif v. Barrett, 355 Ill. 104, 133, 188 N.E. 889), and we consider that it was appropriate to give the Board the authority to impose monetary penalties.
>
> There are adequate standards provided and safeguards imposed on the power given the Board to impose these penalties. The granting of this authority does not constitute an unconstitutional delegation of judicial power.

The Court also noted that the existence of the right to a hearing and appellate review supported its view that the administrative agency had the legal authority to impose fines. Id. at 1182-183. See also Freeman Coal Mining Corp. v. Illinois Pollution Control Board, 21 Ill.App.3d 157 (1974)(Southern Illinois Asphalt "has, in effect, been overruled by the decision of the Illinois

Supreme Court in City of Waukegan."[full citation omitted]). Southern Illinois Asphalt is not valid authority, and Melbourne Corp. v. Hearing Board, 14 Ill.App.3d 589 (1973), cited by IBT, similarly was decided before City of Waukegan, and so is also of questionable validity.

Verizon suggests that it is "simply disingenuous" to claim that section 13-305 does not apply to service quality penalties. Verizon BOE at 7. Rather than respond to Verizon's personal attack, AG/CUB maintain that section 13-305's reach speaks for itself. It only applies where a civil penalty is not otherwise provided in the PUA. Unless Verizon and IBT are suggesting that the fines and penalties provided for in section 13-712(c) are a wholly separate type of enforcement mechanism and that they are in addition to, rather than supplanting, section 13-305, the plain language of sections 13-305 and 13-712, read together, support the rule contained in the Proposed Order.

III. The Proposed Order Properly Adopted the Calculation Method Proposed by AG/CUB in Their Briefs Because it Is the Only Calculation That Accurately Reflects the Exemptions Contained in the Law.

Some parties argued that the Proposed Order should not have adopted the calculation methodology proposed by AG/CUB. Essentially two reasons are given: (1) the method somehow "penalizes" the carriers for situations beyond their control; and (2) the method was proposed in briefs but was not contained in testimony. These arguments are neither valid nor convincing.

The AG/CUB calculation method is based on an analysis of the effect and accuracy of the Staff methodology. Extensive cross-examination demonstrated that Staff's method would increase the reported percentage of timely installations and repairs because exempted conditions would be treated as if timely performed, regardless of when they are actually performed. The calculation would have degraded the current standard in at least two ways: situations were added

to the denominator but not to the numerator, that had not been previously exempted, and these exempted situations were treated as timely irrespective of actual performance. AG/CUB would have been remiss in their responsibility to protect consumers and the public if they had not brought these issues to the Commission's attention.

The Proposed Order fairly and correctly found that the Staff approach "would use excluded situations to get a higher percentage of timely repairs or installations. It would serve no benefit to 'count' the excluded situations as having been timely completed." The Proposed Order found that a method that consistently excluded all exempted situations from the numerator and the denominator was more accurate. Proposed Order at 43.

Verizon suggests that carriers are "penalized for outages wholly outside of their control" under the calculation method adopted in the Proposed Order. The adopted method excludes all outages which are exempted from the rule (and are arguably outside the carrier's control) from the calculation. Therefore, the reported result is not affected one way or the other by the excluded situations. Carriers are not "penalized" for addressing the excluded situations because they have no effect on the measurement of their performance.

Although Verizon argues that the adopted method "seeks to hold a carrier responsible for missing standards due to emergency situations," Verizon BOE at 9, Verizon does not explain how that happens in a calculation that expressly excludes emergency situations. The adopted calculation is beautiful in its simplicity: if a situation is excluded under section 13-712 (220 ILCS 5/13-712(e)(6)) and Part 730, it is not counted at all[2]. Verizon cannot show how emergency or

[2] Section 13-712(e)(6)(i)-(vii) contains the exemptions that are mirrored in section

other excluded situations affect the calculation because they are excluded from both the numerator and the denominator of the ratio, and therefore do not affect it under the rules of simple arithmetic. See, e.g., AG/CUB Initial Brief at 5, 13 at fn. 6.

Verizon states that the adopted method fails to "measure the timely repair of outages within the control of the carrier" is simply wrong. Verizon ROE at 9. The exempted situations Verizon discusses at page 9 of its Exceptions, are not subject to the service standards and time frames contained in the rule. The method, therefore, properly measures only the services that are subject to the rule and that have been determined to be "within the control of the carrier."

Like Verizon, IBT stresses that some of the excluded situations (exclusions (e), (f), (g) and (i) found in 730.545(b)(2)) are not in the control of the carrier. IBT BOE at 16. AG/CUB agree that the delays in these situations are not caused by the carrier, and that is why they are excluded from the calculation and the carriers are not held to any standard or time frame for them. Yet, IBT wants them treated as if they were subject to a time standard and in fact complied with that standard. IBT ignores that if they are included in the denominator, the services that are subject to a standard will be measured against services that are not subject to a standard, resulting in a mismatch, as the Proposed Order correctly concluded.

IBT and Staff suggest that all services should be included in the denominator (representing services performed in a timely manner) including those excluded from the standard, because even the excluded services are part of the carrier's workload. IBT BOE at 17; Staff BOE at 8 (collateral impacts). The problem with this approach is that the rule is not intended to measure the carrier's overall workload – it measures whether the carrier performed *certain* services within

730.535(b)(2)(repairs) and 730.540(f)(installations) of the Part 730 rules.

the time frames established by Section 13-712 and Parts 730 and 732. Some services are excluded from the calculation because they can be expected to take longer than required due to factors beyond the control of the carrier, and those are itemized in section 13-712 and the corresponding rules. The excluded services are not subject to the service quality rule, and should not be part of the measurement meant to determine whether the carrier has in fact met the service quality standards. This does not mean that the excluded situations do not exist. IBT BOE at 18. It only means that they are not subject to the same standard as the other services, and so should not be lumped together in the performance measure.

None of the opponents of the adopted method discuss the mathematical effect of including the carrier's entire workload in the calculation. Including the carrier's entire workload in the denominator distorts the ratio because counting all excluded situations as timely regardless of actual performance will necessarily raise the percentage of timely repairs and installations. Staff witness Sam McClerren admitted that Staff's method would allow a carrier to have more outages over 24 hours than under the previous rule and still meet the standard. Tr. 491-492. This degradation of the standard was properly rejected in the Proposed Order.

In its Proposed Language, IBT suggests that the AG/CUB method is "positively irrational" because it treats excluded situations "as if they did not exist." IBT BOE at 20. IBT misses the purpose of the rule: to determine whether the services subject to performance standards meet that standard. It is not only perfectly rational not to count situations that are not subject to the standard, it is mathematically required to accurately measure only the services subject to the standard. The Commission should adopt the Proposed Order's recommended calculation methodology, and apply consistently to repairs and installations. See AG/CUB BOE at 12-15.

III. IBT's Request to Further Delay the Installation of NIDs Was Properly Rejected in the Proposed Order.

The Proposed Order sensibly concludes that the 2002 deadline for the installation of Network Interface Devices ("NIDs") is reasonable from both a safety and a competitive perspective. The PO's conclusion is based primarily on the fact that the Commission ordered the installation of NIDs outside the premises of all one- and two-line customers by December 31, 2002 in two separate orders – one in 1987 and one in 1995. ICC Docket No. 86-0278 (Third Interim Order, Sept. 1987); ICC Docket No. 94-0431(July 6, 1995 Order).

In its Brief on Exceptions, Illinois Bell argues that the long-standing requirement that NIDs be installed by the end of 2002 is "flawed" for several reasons. IBT BOE at 1. First, Illinois Bell claims that "the Proposed Order would completely ignore the Commission's longstanding policy allowing internally installed NIDs to remain in place." IBT BOE at 2. Illinois Bell refers to the Commission's finding that the installation of external NIDs is required on "all new service installations" and "all old installations that do not have any type of demarcation plug and jack now . . ." Third Interim Order at 5, ¶ 6. Even considering these specific Commission findings in the 1987 Order, however, Illinois Bell has only even attempted to meet the first part of the requirement: that external NIDs are installed during all new service installations. IBT BOE at 11. In fact, Illinois Bell estimates that approximately 500,000 [external] NIDs have yet to be installed. Id.

The Commission has only spoken to the issue of NIDs in the two prior Commission Orders, which each require NID installation by the end of 2002, and there is no evidence in the record demonstrating any policy to limit NID installation only to new installations. *See* Third

Interim Order; July 6, 1995 Order. Illinois Bell erroneously interprets the Commission's lack of enforcement as an established "policy" that gives Illinois Bell carte blanche to violate Commission Orders. As evidence of this, Illinois Bell Witness Muhs stated on the stand that he "had become aware of [the Commission's NIDs requirement] through these proceedings," but that the Company was not in the process of formally complying with the Commission's deadline for NID installation "beyond what they've been doing over the last several years." Tr. at 118. This demonstrates the Company's failure to comply with – or even be aware of – the mandate in the Commission's 1987 and 1995 Orders.

Second, Illinois Bell claims that "the Proposed Order does not provide carriers with sufficient flexibility to complete the installation of NIDs in a manner that will be efficient and customer- friendly." IBT BOE at 2. This statement fails to consider the fact that Illinois Bell has had the privilege of over 15 years of flexibility to complete NID installation. Furthermore, the rule does not change the Commission's 1987 and 1995 orders – it merely echoes the previously ordered requirement. The fact remains that the financial cost of installing NIDs, though now claimed to be a burden by both Illinois Bell and IITA (see IBT BOE at 11, IITA BOE at 4), could have been significantly mitigated had the phone companies paced their compliance with Commission orders throughout the last 15 years.

Illinois Bell further argues that a whole new standard with regard to NID installation should be set in the rule. Illinois Bell argues that the rule "should be limited to installation of an external NID, at no cost, whenever such a NID is requested by the end user or a CLEC serving the end user and no NID has previously been installed. ILECs also should continue to install external NIDs when performing work on any premises lacking a NID." IBT BOE at 12-13. It is rather

incredulous that Illinois Bell, only three months before the deadline for NID installation, should suggest such a drastic departure from the Commission's 1987 and 1995 Orders, which made very clear the NID installation requirements.

As stated in the Proposed Order, NIDs are not only an important technological improvement to facilitate effective competition, but also provide important safety and quality protections. Proposed Order at 29. With regard to the impact on customers, if NIDs are installed externally, there would be little inconvenience to the customer at the time of installation and a real benefit to the consumer later if the consumer changed carriers or experienced inside wiring or other service problems. Only in the event that an internal NID was present would the customer absolutely need to be present for the installation of the external NID. Rather than a burden to customers, the installation of a NID will allow customers to be able to diagnose a service outage and determine whether the problem relates to the network or inside wiring. It is in the public interest for the Commission to uphold its 1987 and 1995 Orders, requiring NID installation by the end of 2002, and therefore the Proposed Orders conclusion regarding NIDs should stand.

IV. The IITA's Opposition to Quarterly Reporting Must Be Directed to the General Assembly.

IITA argues that carriers should not be required to file quarterly reports of service quality performance. IITA BOE at 2-3. IITA ignores that section 13-712 of the Public Utilities Act specifically requires that Commission rules "require each telecommunications carrier to provide to the Commission, on a quarterly basis and in a form suitable for posting on the Commission's website, a public report that includes performance data for basic local exchange service quality of service." 220 ILCS 5/13-712(f). As has been asserted by various parties, the Commission is a

creature of the legislature, and must conform its rules and orders to the Public Utilities Act. If IITA is unhappy with that requirement, it must raise its concerns with the General Assembly.

V. Staff Recommends a Fair and Neutral Resolution of How the Question of a Strike Exemption Should Be Addressed.

Staff recommended language to preserve the Commission's ability to coordinate this Part 730 rule with Part 732 in connection with whether to include strikes and work stoppages in the definition of emergency situations. AG/CUB agree with Staff's proposed resolution. Staff's proposed language is fair to all parties, is neutral, and allows the Commission to have the strike exemption issue resolved in the docket which was opened specifically to address that issue (ICC Docket 02-0426).

VI. Conclusion

For the foregoing reasons, AG/CUB request that the Commission adopt an Order consistent with the arguments stated above and in their Exceptions and Brief on Exceptions.

Respectfully Submitted,

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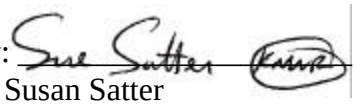
By: 

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